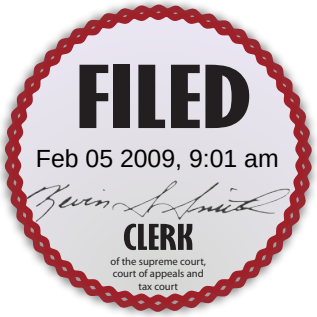

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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER G. PARKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0805-CR-456
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0711-FA-520

February 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Christopher G. Parker was convicted of Burglary Resulting In Bodily Injury,[1] a class A felony, Theft,[2] a class D felony, and Battery By Means of a Deadly Weapon,[3] a class C felony. In this appeal, Parker challenges those convictions and the sentences imposed thereon, presenting the following restated issues for review:

1. Was the evidence sufficient to support Parker's convictions?

2. Do Parker's conviction of both burglary resulting in bodily injury as a class A felony and battery with a deadly weapon at a class C felony violate Indiana's double jeopardy clause?

3. Did the trial court cite improper aggravating circumstances in sentencing Parker?

4. Was Parker's sentence inappropriate?

We affirm.

The facts favorable to the convictions are that at approximately 10:30 p.m. on October 25, 2007, Parker and his younger brother, Timothy, were present at a Noblesville apartment with Jordan Swan and Caleb Crisman. Parker told Swan he and his brother were going to meet a friend in Lapel, Indiana and Swan offered to drive. Following directions given by Parker, Swan drove to Lapel and stopped there on Erie Street. Parker and Timothy exited the car, telling Swan and Crisman they were going to their friend's house, and would return. Swan agreed to wait for them.

Brenda Whetsel lived at 124 Erie Street, which was approximately three blocks from

[1] Ind. Code Ann. § 35-43-2-1(1) (West, PREMISE through 2008 2nd Regular Sess.).
[2] I.C. § 35-43-4-2(a) (West, PREMISE through 2008 2nd Regular Sess.).
[3] Ind. Code Ann. § 35-42-2-1(a)(3) (West, PREMISE through 2008 2nd Regular Sess.).

where the Parker brothers left Swan's parked car. She was sixty years old and afflicted with terminal breast cancer. After leaving Swan's car, Parker and his brother had donned ski masks and gloves and walked to Whetsel's house. Whetsel was in her bathroom when she heard someone enter her house through the kitchen door, which was the only outside entrance to the house. Through the slightly open bathroom door, Whetsel could see and hear two intruders going from room to room, opening drawers and obviously looking for something. She tried unsuccessfully to call police on her phone. The intruders stood outside the door until Whetsel got off the toilet and then they "rushed into the bathroom and … started fighting" with her. *Transcript* at 317. Whetsel grabbed one of them and as she struggled with him she told him she was dying of cancer, that she did not have any drugs in the house, and she asked them to go home. One of the intruders responded that "they didn't care if [Whetsel] was dying of cancer, they wanted the fucking drugs anyway." *Id*. at 330-31. As the man with whom Whetsel initially fought beat her with his fists, the second man said, "Are you alright Tim?" *Id*. at 317. The first man responded, "Yes." *Id*. At that point, the second man began hitting Whetsel with a golf club he had taken from a barrel on Whetsel's porch, saying "Don't hurt my brother." *Id*. at 318. As Whetsel continued to hold the first assailant, the second assailant struck her with the golf club on her right shoulder, on and below her left breast, her left arm and wrist, the side and back of her head, and "clear across [her] stomach." *Id*. at 319. Whetsel finally let go of the first assailant when the second assailant struck her hand with the golf club, breaking several of her fingers and inflicting a serious gash wound. While the intruders were beating Whetsel, they continued to demand to know where she kept

her drugs. All the while, Whetsel could hear what sounded like pill bottles with pills in them rattling in the two men's pockets. At that point, the second assailant ripped her medicine cabinet from the wall and slammed it to the ground. Finding nothing inside, the intruders fled from the residence. Whetsel called police immediately after the intruders departed and reported what had happened. She informed police that the assailants had taken some of her Methadone, Soma, Xanax, Tessalon, Perles, and Compazine, all of which were prescription medications taken by Whetsel directly or indirectly in conjunction with her illness. The next day, Whetsel discovered that a pouch containing money and other prescription drugs had also been taken.

Meanwhile, approximately ten or fifteen minutes after they had departed, the Parkers reentered Swan's car and told Swan, "let's go." *Id*. at 272. The four drove back to Swan's residence. After staying there for ten to fifteen minutes, Crisman drove Parker home and then returned to Swan's, where he picked up Timothy Parker. The two traveled to Kokomo to "hang out with some girls." *Id*. at 275. The next morning, the two drove back to Noblesville. During that drive, Timothy Parker told Crisman that he (Timothy) and Parker "robbed a lady" the night before, that "she got hurt", and they "got a bunch of pills." *Id*. at 278, 283, and 278, respectively. Timothy and Crisman eventually ended up at a mobile home on East 246th Street in Hamilton County. Timothy went inside while Crisman fell asleep in the vehicle.

The day after the burglary, Sergeant Allan Phillips, a police officer for the Town of Lapel, was investigating the incident at Whetsel's home when he got a phone call from

someone named Crystal Swinford claiming to have information about the burglary. She informed Sgt. Phillips that "Tim and Chris Parker were at an address at 12545 East 246th Street, Lot 4 in Hamilton County and that they still had the prescription bottles and the pills on them at the time." *Id*. at 175. The caller also described the vehicle that the Parkers were driving. Law enforcement officials traveled to that location and discovered Crisman asleep in a car matching the description provided by the caller and parked outside a trailer. After speaking with Crisman, police entered the trailer and found Timothy Parker lying on a daybed. With some difficulty, police managed to rouse Timothy and asked for his identification. Timothy pulled "a little blue or dark colored bag" out of his back pocket and dumped its contents on a desk. *Id*. at 178. Whetsel later identified that bag as the one that was missing from her home after the intruders left. The bag contained "quite a bit of change, some body paints and jewelry and … a prescription bottle with several pills in it." *Id*. at 179. Police subsequently determined that the bottle contained Methadone, Soma, and Xanax.

Parker was charged with burglary resulting in bodily injury, theft, and battery by means of a deadly weapon. He was convicted as charged following a jury trial. Following a hearing, the court sentenced Parker to forty-five years for the burglary conviction, five years for the battery conviction, and eighteen months for the theft conviction. The sentences were to run concurrent with one another, for a total executed sentence of forty-five years.

1.

Parker contends the evidence was insufficient on two bases to support his convictions. He first claims the evidence was not sufficient to identify him as the perpetrator of the

offenses against Whetsel. Second, he contends the evidence was not sufficient to prove the "breaking" element of burglary.

Our standard of review for challenges to the sufficiency of evidence is well settled.

> When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007).

In support of his argument that the evidence was insufficient to prove identity, Parker points out primarily that (1) Whetsel's assailants wore gloves and ski masks and therefore she could not see what they looked like; (2) there was no fingerprint or DNA evidence to connect him to the crimes; (3) Whetsel's description of the clothing worn by the assailants did not match Parker's clothing that was "produced or described at trial"; and (4) although Whetsel's blood was "all over her bathroom floor and sink, none of her blood was found on either Christopher or Timothy's clothes or in Jordan's car." *Appellant's Brief* at 11.

We first observe that all of the foregoing facts were placed before the jury, which returned guilty verdicts on all counts. The evidence – or lack thereof – that Parker cites is not fatal to the convictions because witness positive identification and forensic evidence are not the only methods by which a perpetrator's identity may be established. To the contrary, identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. *Bustamante v. State*, 557 N.E.2d 1313 (Ind. 1990). In this case, among

other things: (1) Parker was in the immediate area at the time of the crimes, under somewhat suspicious circumstances; (2) Whetsel heard one of the assailants refer to the other as "Tim" and "my brother", *Transcript* at 317 and 318, respectively; (3) Parker was in possession of Whetsel's stolen bag and its contents the morning after the incident; and (4) Timothy Parker told Crisman that he and Parker robbed and hurt a woman the night before, taking pills from her. This evidence was sufficient to prove Parker was one of the two men that assaulted Whetsel and took her property.

In order to obtain a conviction for burglary under I.C. § 35-43-2-1, the State was required to prove that a "breaking" occurred. "Using even the slightest force to gain unauthorized entry satisfies the breaking element of the crime." *Davis v. State,* 770 N.E.2d 319, 322 (Ind. 2002). Thus, for example, opening an unlocked door or pushing open a door that is slightly ajar constitutes a breaking. *Davis v. State,* 770 N.E.2d 319. Parker contends, in essence, that the State failed to prove he gained entry to Whetsel's apartment by opening a door.

"[A] burglary conviction may rely on circumstantial evidence, and does not need to exclude every reasonable hypothesis of innocence so long as an inference may be reasonably drawn that supports the factfinder's conclusions." *Calhoon v. State*, 842 N.E.2d 432, 434 (Ind. Ct. App. 2006). Whetsel testified that her house was unlocked on the night of the offense and that she "heard somebody come in the kitchen door[.]" *Transcript* at 316. This statement permits an inference that Parker's entry into Whetsel's house was through the kitchen door, presumably discernible from Whetsel's vantage point by sound. The inference

that the outside kitchen door was closed, not standing open or missing altogether, when the Parkers arrived later in the evening of October 25, and that they entered Whetsel's apartment by opening it, can reasonably be drawn from the evidence. Sufficient evidence supports the element of breaking and entering.

2.

Parker contends his conviction of both burglary resulting in bodily injury as a class A felony and battery with a deadly weapon as a class C felony violate Indiana's double jeopardy clause. Article 1, section 14 of the Indiana Constitution provides, "No person shall be put in jeopardy twice for the same offense." In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), our Supreme Court announced the following two-part test for Indiana double jeopardy claims:

> [T]wo or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

Parker challenges his convictions only as violative of the actual evidence test.

Our Supreme Court articulated this method of double jeopardy analysis in *Richardson* as follows:

> Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Richardson v. State, 717 N.E.2d at 53. In *Spivey v. State*, 761 N.E.2d 833 (Ind. 2002), the Court amplified upon this aspect of *Richardson*, explaining:

> The test is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense. In other words, under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.

"Thus, even if 'each charge utilizes the same factual event,' no constitutional violation will be found if the second offense 'requires additional evidentiary facts establishing the essential elements.'" *Vandergriff v. State*, 812 N.E.2d 1084, 1086-87 (Ind. Ct. App. 2004) (quoting *Davis v. State*, 770 N.E.2d 319, 324 (Ind. 2002)). "Application of this test requires the court to 'identify the essential elements of each of the challenged crimes and to evaluate the evidence from the jury's perspective[.]'" *Lee v. State*, 892 N.E.2d 1231, 1233-34 (Ind. 2008) (quoting *Spivey v. State*, 761 N.E.2d at 832). In determining which facts were used by the fact-finder to establish the elements of each offense, we may consider the charging information, the jury instructions, and the arguments of counsel. *Lee v. State,* 892 N.E.2d 1231.

The elements of burglary causing bodily injury as a class A felony, as charged in this case, are: (1) breaking and entering (2) the structure of another person, (3) with the intent to commit a felony (4) resulting in bodily injury to a person other than the defendant. I.C. § 35-43-2-1. The elements of battery by means of a deadly weapon, as a class C felony and as charged in this case, are: (1) a knowing or intentional touching (2) of another person (3) in a

rude, insolent, or angry manner, (4) by means of a deadly weapon. *See* I.C. § 35-42-2-1(a)(3). Parker contends the two offenses "overlap … because the State alleged in the charging information for both counts that "the commission of such offense resulted in bodily injury to Brenda Whetsel, to wit: abrasions, lacerations, broken fingers, pain and discomfort." *Appellant's Brief* at 18.

Absent proof of a deadly weapon, in order to convict Parker of battery as a class C felony based upon injury, the State would have to prove that Whetsel suffered *serious* bodily injury. *See* I.C. § 35-42-2-1(a)(3). Proof only of bodily injury (as opposed to serious bodily injury) would serve merely to elevate the offense from a B misdemeanor to an A misdemeanor, unless the victim met certain criteria, none of which apply here. In other words, although alleged in the charging information for the battery offense, Whetsel's level of injury, i.e., bodily injury, could not support a conviction of class C felony battery. This means, of course, that the battery conviction was necessarily based upon the jury's determination that the State had proven the following elements: Parker (1) knowingly or intentionally (2) touched Whetsel (3) with a deadly weapon, i.e., the golf club. *See* I.C. § 35-42-2-1. The level of injury was simply not an element of the battery offense with which he was charged and of which he was convicted. On the other hand, the burglary conviction was obtained upon the jury's findings that Parker (1) broke and entered (2) Whetsel's home, (3) with the intent to commit a felony, i.e., theft, (4) resulting in bodily injury to Whetsel. *See* I.C. § 35-43-2-1.

In view of the above, to find Parker guilty of both burglary as a class A felony and

battery as a class C felony required proof of at least one unique evidentiary fact. *See Bald v. State*, 766 N.E.2d 1170 (Ind. 2002). For the burglary conviction, the unique facts are that Parker broke and entered into Whetsel's home intending to commit theft, and that Whetsel suffered injury thereby. For the battery conviction, the unique fact is that Parker used a deadly weapon. Because each conviction was established by at least one unique evidentiary fact, we conclude that Parker's convictions do not violate Indiana's prohibition against double jeopardy. *See Scott v. State*, 867 N.E.2d 690, 697-98 (Ind. Ct. App. 2007)

3.

Parker contends the trial court cited improper aggravating circumstances in imposing an enhanced sentence. Specifically, Parker contends the court erred in citing Whetsel's age and medical condition as aggravating circumstances.

When imposing a sentence for a felony offense, trial courts are required to enter a sentencing statement. This statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 If the court finds aggravating or mitigating circumstances, it "must identify all *significant* mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Anglemyer v. State*, 868 N.E.2d at 490 (emphasis supplied). An abuse of discretion in identifying or failing to identify aggravators and mitigators occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Anglemyer v. State*, 868 N.E.2d at 490

(quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)). Also, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Anglemyer v. State*, 868 N.E.2d 482.

In making this argument, Parker points out that the age at which the trial court is statutorily entitled to find the victim's age as an aggravating factor is sixty-five, not sixty. *See* Ind. Code Ann. § 35-38-1-7.1 (West, PREMISE through 2008 2nd Regular Sess.). He also notes that although the victim's disability or physical infirmity are statutory aggravating circumstances, "the State made no showing that Whetsel was disabled or mentally or physically infirm … [or] was incapacitated by the cancer." *Appellant's Appendix* at 14. Even assuming Parker is correct that these factors do not meet the statutory requirements for such aggravators under I.C. § 35-38-1-7.1, we note that the nature and circumstances of a crime may be legitimate aggravating factors. *See Miller v. State*, 720 N.E.2d 696 (Ind. 1999). In this case, the trial court cited as aggravators Whetsel's age and illness, the fact that she pleaded for mercy on the basis of her illness and Parker ignored it, and the fact that she was "clearly … impaired" by her illness. *Transcript* at 437. In so doing, we conclude that the trial court was properly citing particularized circumstances of the crime that constitute legitimate aggravating circumstances on the facts of this case. In so doing, we note the stark disparity between Parker's age (twenty years old at the time he committed these offenses) and general physical condition relative to Whetsel's. Such consideration of victims who are

especially vulnerable by virtue of their age or particular circumstances is not inappropriate. The trial court did not err in this regard.

4.

Parker contends his sentence was inappropriate. We have the constitutional authority to revise a sentence if, after considering the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d at 381. Parker bears the burden on appeal of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

Beginning with the nature of this offense, the disturbing circumstances of the crime are that the victim in this case was sixty years old - almost three times Parker's age. Put bluntly, Parker went to the home of a woman who was three times his age and terminally ill with cancer in order to steal her cancer medications. Moreover, even if Parker did not know Whetsel was a cancer patient when he went there, he became aware of it during the crime when the victim told him of her illness as she pleaded for the Parkers to cease the attack. He was not moved by this knowledge to cease the attack, but continued to beat the victim with a golf club.

Turning now to Parker's character, he was only twenty years old when he committed these crimes, yet he had already been arrested on five other occasions. Although one was

dismissed, he was convicted on two counts of conversion, possession of marijuana, paraphernalia, and a switchblade, and illegal consumption of alcohol and had a trial pending for possession of a controlled substance, possession of marijuana, and resisting law enforcement. In light of the instant offenses, the previous substance abuse offenses take on added weight. Finally, although we have detailed the disturbing facts of these crimes in discussing the nature-of-the-offenses element of this calculation, we pause here to consider what those facts reveal of Parker's character. It appears that Parker somehow knew that Whetsel possessed the kinds of drugs that he ultimately stole from her. As noted above, if he did not know ahead of time, he became aware while beating her inside her house that she was a cancer patient. This did not prevent him from severely beating her with a golf club, which we further note he had armed himself with before entering the bathroom. We agree with the State's assertion that, ultimately, the beating of Whetsel was gratuitous – outnumbered, terminally ill, and three times their age, she was in no position to stop them from ransacking her home.

After reviewing Parker's character and the nature of the offenses of which he was convicted, we cannot say the forty-five-year executed sentence imposed by the trial court is inappropriate.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur